

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

32942

FILE: B-219973

DATE: December 9, 1985

MATTER OF: Rose Marie Baron - Retroactive Salary Increase

DIGEST:

An employee of the Equal Opportunity Commission was hired with the understanding she would be appointed at step 4 of grade GS-14. After actual appointment at minimum step of that grade, it was discovered that prior approval of the higher rate was not obtained from the Office of Personnel Management (OPM), due to administrative oversight. Upon subsequent, but prospective approval of higher step placement by OPM, a claim for retroactive increase in that pay is made here. The claim is denied. Under 5 U.S.C. § 5333, 5 C.F.R. § 531.203(b), and General Accounting Office decisions, appointments to grades GS-11 and above may be made at a rate above the minimum rate of the grade, but only with prior approval of OPM. Since such appointment is discretionary and not a right, the employee may not receive a retroactive increase. See Susan E. Murphy, 63 Comp. Gen. 417 (1984).

This decision is in response to a request from a District Director, Equal Employment Opportunity Commission (EEOC), concerning the entitlement of Ms. Rose Marie Baron to receive a retroactive adjustment in her step-placement and backpay. We conclude that she is not entitled for the following reasons.

In November 1983, an employment offer was made to Ms. Rose Marie Baron to become a Supervisory Trial Attorney in the Milwaukee District Office, EEOC. On the basis of a finding that she had superior qualifications for the position, it was agreed that her entry salary was to be established at the rate of step 4 of grade GS-14. However, due to administrative error, the EEOC failed to file an advance request with the Office of Personnel Management (OPM) for approval of an appointment at the higher step of grade GS-14.

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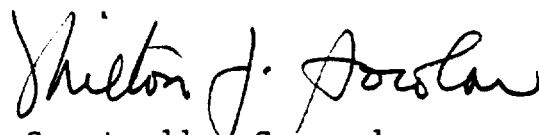
As a result, when Ms. Baron entered on duty on November 21, 1983, her rate of pay was established at step 1 of that grade.

Following discovery of the error, the necessary approval was sought from OPM. However, due to the fact that EEOC failed to furnish sufficient documentation of her superior qualifications with the approval request, OPM approval was further delayed. Notice of approval was eventually issued by OPM on July 15, 1985, in which it was stated that "Ms. Baron's salary adjustment may not be made effective before July 11, 1985."

Because OPM admitted in that notice that they would have approved the request had it been made earlier, but could not make it retroactive due to their lack of authority to grant backpay, the matter has been submitted here for resolution.

In decision Susan E. Murphy, 63 Comp. Gen. 417 (1984), which also involved an EEOC employee with a superior qualification appointment, we considered the issue of retroactive adjustment in step-placement and backpay where there was administrative error in failing to file a timely request with OPM. We denied that claim for the reason that under the provisions of 5 U.S.C. § 5333 (1982), and 5 C.F.R. § 531.203(b) (1983), while appointments may be made at a pay rate above the minimum rate for grades GS-11 and above, they may only be made with prior approval of OPM. Further, since such approval is discretionary and does not involve an employee right granted by statute, delayed approval of that higher pay rate would not permit a retroactive increase in pay, even though approval delay was caused by agency error.

It is our view that the situation described in the present case is indistinguishable from the Murphy case. As a result, we consider that case to be controlling and Ms. Baron's claim may not be certified for payment.


Acting Comptroller General
of the United States